Nos. 14-556, 14-562, 14-571, 14-574

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In The Supreme Court of the United States

JAMES OBERGEFELL, ET AL.,
Petitioners,

V.

RICHARD HODGES,
Respondent.

BRITTANI HENRY, ET AL.,
Petitioners,

V.

RICHARD HODGES,
Respondent.

Additional Case Captions Listed on Inside Front Cover

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE INTERNATIONAL CONFERENCE OF EVANGELICAL ENDORSERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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APRIL DEBOER, ET AL.,

Petitioners,

v.

RICHARD SNYDER, ET AL.,

Respondents.

VALERIA TANCO, ET AL.,

Petitioners,

v.

WILLIAM EDWARD "BILL" HASLAM, ET AL.,

Respondents.

TIMOTHY LOVE, ET AL. AND GREGORY BOURKE, ET AL.,

Petitioners,

v.

STEVE BESHEAR,

Respondents.

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2. Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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INTERESTS OF THE AMICI[1]

The International Conference of Evangelical Chaplain Endorsers (ICECE) is a conference of evangelical organizations whose main function is to endorse Christian chaplains to the military and other organizations requiring chaplains.[2] ICECE was organized specifically to identify, define, and address issues of particular importance to Christian evangelical military chaplains and the military personnel they represent in the special and unique military society comprised of different Armed Services and their challenging environments. This Court has recognized the military is a special society which demands an obedience unknown by civilian society and to whom the judiciary grants great deference. *See Parker v. Levy*, 417 U.S. 733, 743-44 (1974); *Chapell v. Wallace*, 462 U.S. 296, 299-301

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1 No counsel for any party on this brief in whole or in part, and no counsel or party made a contribution intended to fund the preparation or submission of this brief. No individual other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission. Respondents' attorneys have filed letters granting consent to file amicus briefs and Petitioners have granted ICECE permission to do so.

2 Endorsement is the process by which a DOD recognized religious organization certifies that its clergy or religious leaders meet the required education, training and experience and is qualified to provide religious ministry to the endorsing agent's military members; facilitate the free exercise of other military personnel, dependents and other authorized DOD personnel; and care for all service personnel. *See* DOD Instruction 1304.28 (describing endorsement process and criteria).

(1983). ICECE's most important issue is the protection and advancement of religious liberty for all chaplains and military personnel.

ICECE's members represent independent, evangelical, Christian churches which provide chaplains to the military to serve like minded God-fearing military personnel and dependants. They adhere to the historic orthodox Christian doctrine that marriage is the Divinely-ordained union between one man and one woman and all sexual relationships outside of marriage violate the law of God, historically called, sin, including same-sex sexual relations. These churches and their chaplains affirm that man's modern invention of "same-sex" marriage is a dangerous defiance of Almighty God's purpose in forming Man as male-and-female for union in one-flesh, thus ordered at Creation in His Image. Their chaplains teach, preach and counsel from this Biblical understanding, in accord with God's Word, rejecting differing modern inventions of man. Counseling and preaching sometimes refer to the risky, unhealthy behaviors characteristic of the homosexual lifestyle that medical and public health studies show often lead to diseases, antisocial behavior and problems such as depression.

These Amici present unique constitutional concerns, issues and challenges that necessarily arise because of the special factors surrounding their Christian chaplains' role as both representatives of their Christian endorsing-body to the military and commissioned military officers subject to the rules, regulations and discipline of the Armed Forces. *See In re: England*, 375 F.3d 1169, 1171 (D.C. Cir. 2004)

In re: England, 375 F.3d 1169, 1171 (D.C. Cir. 2004) *cert. denied,* 543 U.S. 1152 (2005) ("chaplain's role within the service is 'unique' involving simultaneous service as clergy or a 'professional representative' of a particular religious denomination and as a commissioned naval officer") and II.A *infra*.

The context of these concerns, issues and challenges is the destructive impact on the First Amendment's protections in the military if the extraordinary and unusual relief Petitioners seek from this Court is granted. The Court has phrased the issues in the context of the 14th Amendment. Stripped to its essence, Petitioners ask the Court to elevate to the status of a constitutional right what was essentially a common law crime when the Constitution and the First and Fourteenth Amendments were ratified and became the supreme law of the land.

While at first glance this may not seem to be an issue within the purview of Christian military chaplains, the inevitable result of amending the Constitution by judicial fiat instead of through Article V, creates a conflict between the Constitution's religious liberty and Free Speech clauses, their underlying principle of freedom of conscience, and the military's need for "good order and discipline" in the face of the inherent battle of opposing views of the nature and purpose of marriage and man. It undermines the respect due the "rule of law", an important part of military culture, and subverts and causes doubt about the meaning and value of the Constitution all military swear or affirm to support and defend against all enemies.

Recent incidents between Christian chaplains and same-sex activists demonstrate the conflicts and divisions a constitutional right to same-sex marriage will cause with adherents of historic orthodox Christian teaching in the military culture. This possibility gravely concerns these Amici.

CONSTITUTIONAL PROVISIONS

The First Amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The relevant portion of the Fourteenth Amendment to the Constitution states:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE FUNDAMENTAL ISSUE

The fundamental issue before the Court is whether the federal government, of which the judiciary is a part, can usurp a right the States specifically reserved for themselves when ratifying the Constitution. There is no record of the States knowingly and willingly ceding this right, to define and regulate marriage, to the federal government as a delegated power, a fact *Unites States v. Windsor*, 133 S.Ct. 2675, 2691-92 (2013), would seem to affirm. That fact would seem to answer both Questions for Review in the negative.

The States have defined marriage according to their judgment about significant governmental interests in families, including stability, relationships, and the legal rights resulting from those relationships, including property, inheritance and child welfare among others. Each State has had the right to evaluate its interests independently of other States. Until recently, most States defined marriage in terms of heterosexual relationships because in each State's judgment, that definition produced the greatest good for its citizens. The fact States have defined marriage in heterosexual terms which happen to correspond with the historic, orthodox Christian view of marriage is not the result of the States' choice between competing theologies or ideologies. Rather, each State has made individual governmental choices based on secular and neutral terms directly related to each State's vital governmental interests. Historically, same-sex marriage was illegal under common law because States viewed their interests as so important that they banned other forms of "marriage."

The problem confronting these Amici is a Court decision elevating a common law crime to a constitutional right will impose on the Nation a competing ideology, contrary to historic, orthodox Christianity. This means historic, orthodox Christian chaplains teaching, preaching, counseling and practicing their faith as guaranteed by the Bill of Rights, the NDAA, and regulations based on Title 10 will be doing so in opposition to this newly created "right." This will produce an inherent and irreconcilable tension, resulting from Christian chaplains' obligation to support and defend the Constitution when that obligation conflicts with their legally mandated duty to represent their faith, sending churches and endorsers in order to minister to military personnel of like faith. The military's total control of the meaning of "good order and discipline" will create an inherent Constitutional conflict, as evidenced by current problems.

SUMMARY OF ARGUMENT

America's military sacrifices are the reason we are an independent nation. An important part of that has been the role of the chaplains to provide the spiritual strength which sustains the soul of our nation's military protectors and fighters. The Constitution imposes an obligation on Congress to provide a chaplaincy to address the free exercise needs of its service personnel. Failure to do that would make the government hostile to religion, contrary to the Establishment Clause, due to the limitations placed on free exercise by the military's unique and inherent nature, *e.g.*, combat, need for

rapid deployments to foreign lands with language and cultural barriers. Thus, chaplains are a constitutional requirement reflecting the military's makeup because free exercise requires more than belief.

Military chaplains are representatives of their endorsing faith communities to the military to provide for the free exercise of religion for their own faith groups, facilitate the free exercise needs of others, and care for all. Chaplains remain accountable to their sending churches for their military ministry. Chaplains represent their sending churches in speaking, counseling, providing religious education and worship, and all activities related to their office. The Free Speech Clause protects their activities as well as their speech.

There has been increased tension and conflict between activists for same-sex marriage and evangelical chaplains following this Court's decision in *United States v. Windsor*. Lieut. Commander ("LCDR") Modder was recently threatened with expulsion despite 19 years of honorable service because he counseled and responded according to his faith perspective to questions from a same-sex couple. This is contrary to the Constitution and specific protections Congress enacted in the fiscal year 2013 and 14 National Defense Authorization Acts (NDAA) in response to concerns and numerous reports of similar issues in the Armed Services.

This illustrates the inherent conflict between the Christian view of and teaching on marriage and that of same-sex marriage. Some same-sex couples find

historic, orthodox Christianity offensive, ignoring the Free Speech Clause which does not give them a veto over other free speech. LCDR Modder's case shows that the military leaders, responsive to civilian direction, can use "good order and discipline" to effectively override the First Amendment's specific guarantees. Other incidents show Armed Services leaders have ignored similar violations of law, regulation, breeches of discipline and the Constitution, allowing them to go unaddressed, while retaliating against chaplains for exercising their faith. Such retaliation occurs under the rubric of "maintaining good order and discipline". This is a harbinger of the results coming if same-sex marriage, a former common law crime, is elevated to a constitutional right. Those who preach historic Christianity would then be arguing against a constitutional right and sowing dissension, despite the Constitution's specific protections. This will, in effect, create a new military civic religion based on homosexual practices with a fabricated liberty interest yet with no history or roots in the concept of ordered liberty.

This inevitably leads to disrespect for the rule of law, and raises legitimate questions for the military about the nature and meaning of the "Constitution" they swear to defend at the cost of their lives. Homosexual practices and therefore same-sex marriage were common law crimes until recently, in many states they remain so. It would be a pernicious doctrine to say that a liberty interest exists in a crime and courts can amend the Constitution without using the Constitution's Article V processes, effectively modifying the Bill of Rights. This has grave implications for military personnel.

ARGUMENT

I. THE CONSTITUTION REQUIRES THE MILITARY HAVE CHAPLAINS

> I look upon the spiritual life of the soldier as even more important than his physical equipment...the soldier's heart, the soldier's spirit, the soldier's soul are everything. Unless the soldier's soul sustains him, he cannot be relied upon and will fail himself and his commander and his country in the end. It's morale, and I mean morale, which wins the victory in the ultimate, and that type of morale can only come out of the religious fervor in his soul.

Gen. George C. Marshall, quoted in JCS Joint Pub 1-05, Religious Ministry Support for Joint Operations, 1996.

Gen. Marshall's statement is borne out in our history. Chaplains have been part of our military even before the United States became a nation. They accompanied the militia of the 13 colonies that became the Continental Army in 1775 and Congress authorized pay for Continental Army chaplains, July 29, 1775. *Katcoff v. Marsh*, 755 F.2d 223, 225 (2nd Cir. 1985) (citation omitted). The Continental Congress also authorized chaplains for its ships. Clifford Drury, the History of the US Navy Chaplain Corps, Volume 1, NAVPERS 15807 at 3-4. Congress authorized "appointment of a commissioned Army chaplain" before the First Amendment was ratified.

Katcoff, 755 F.2d at 225 (citation omitted). They've served in every war, armed conflict and peace consistent with the Constitution.

A. The Establishment Clause's Neutrality Mandate Requires a Military Chaplain Corps

Katcoff examined the constitutional dimension of the Army Chaplain Corps and rejected an Establishment Clause claim that providing chaplains impermissibly tangled government with religion. *Katcoff* held the chaplaincy was Congress' appropriate and necessary accommodation of the competing Constitutional commands of the Establishment, Free Exercise and War Power Clauses, *id.* at 232-35, 237, and a constitutional necessity: without a Chaplain Corps to allow for Free exercise, the government would violate the Establishment Clause's neutrality mandate.

> It is readily apparent that [the Free Exercise] Clause, like the Establishment Clause, obligates Congress, upon creating an Army, to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denomination are not available to them. *** Unless the Army provided a chaplaincy it would deprive the soldier of his right under the Establishment Clause not to have his religion inhibited and of his right under the Free Exercise Clause to practice his freely chosen religion.

Id. at 234; *id.* at 232 ("by removing them to areas where religious leaders of their persuasion and facilities were not available [the Army] could be accused of violating the Establishment Clause unless it provided them with a chaplaincy").

Inherent in this decision is the recognition that "free exercise" of religion involves all other First Amendment rights and is not limited to a mental exercise or "belief" alone. Free exercise of religion requires no established government religion; free speech so that religious doctrines can be preached, taught, and communicated to others and ceremonies and symbols (expressive speech) conducted and explained ; assembly, in order to meet together to participate in worship and rites; and the right to petition because religion motivates actions, often against evil or injustice as evidenced by the religious fervor leading up to and during the War for Independence,[3] the Civil War and the civil rights movement, to name just a few examples. To diminish one of these rights is to diminish and nullify them all.

B. A Constitutional Chaplain Corps must Reflect the Military's Free Exercise Needs

Katcoff's used neutrality as the balancing criteria between the two religion clauses. *Id.* at 231 (Army "observes the basic prohibition "of neutrality" and voluntariness, expressed in *Zorach v. Clauson*, 343

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3 The British referred to America's Colonial pastors as the "Black Robbed Regiment."

U.S. 303, 314 (1952)). The court found that without a chaplaincy, military service realities, *e.g.*, "mobile, deployable nature of our armed forces" ,*id.* at 228 , would restrict soldiers' ability to exercise their Free Exercise rights. This would conflict with the Establishment Clause's command that government neither hinder nor establish a religion and emphasized the several ways this could happen due to the nature of military service. *Id.*

Katcoff's constitutionality analysis focused on the need for soldiers to find "religious leaders of their persuasion" or like those available in their communities had military service not required they leave, *see, e.g., id.* at 232. It cited Congress's obligation "to make religion available to soldiers who have been moved by the Army to areas of the world where *religion of their own denominations* is not available to them" or violate their rights under both Religion Clauses". *Id.* at 234 (emphasis added).

II. THE CONSTITUTION DEFINES AND LIMITS THE ROLE OF BOTH THE MILITARY AND ITS CHAPLAINS

A. Chaplains Are Faith Group Representatives Who Remain Accountable to Their Faith Communities for Ministry

1. Chaplains are not government religious representatives.

Although military officers, chaplains retain their "unique" and distinct role as faith group

representatives to the military, accountable to their endorsers for their ministry. *In re England*, 375 F.3d at 1171. *Rigdon v. Perry*, 962 F. Supp. 150 (DDC 1997), emphasized that point.

Rigdon challenged the Clinton Administration's efforts to censor chaplains from communicating information to their congregations about Congress's attempts to pass the Partial Birth Abortion Bill and urging their congregants to write Congress in support of it. The government claimed support of the Catholic Church's "Project Life Post-card Campaign", was political speech and chaplains were forbidden from discussing it because they were officers and regulations barred officers rom using "their position" to influence "Congressional action or pending legislation." *Id.* at 152-53. The government argued (1) "military chaplains do have 'official' authority, because they are commissioned officers", despite having "rank without command", *id.* at 157-8; and (2) "when chaplains perform [their] religious functions they are acting in their official capacity as a military officer", *id.* at 159.

Rigdon rejected those arguments because statutes and other authority precluded chaplains from ever being "superior officers", *id.* at 159, and the military's own regulations demonstrated "chaplains act as representatives of their religions when conducting services or performing rituals." *Id.* at 159-160. *Rigdon* held the government had violated the Religious Freedom Restoration Act (RFRA) and the Plaintiffs' First Amendment Rights.

10 U.S.C. § 643 recognizes the fact that chaplains remain accountable to their endorsing agencies for their military ministry by requiring separation from the service if a chaplain loses his "professional qualifications", defined by the Defense Department as the chaplain's s endorsement. That decision is solely in the hands of the endorser and chaplains are the only officer who can lose his/her career at any time and for any reason as determined by an outside agency.

2. The Establishment Clause mandates religious organizations decide who represents their faith to the military

Turner v. Parsons, 620 F Supp. 138 (D.C. Pa. 1985), rejected a priest's argument the Veterans Administration could determine for itself who could represent the Catholic Church as a VA chaplain. The VA mirrors DOD's requirement its chaplains have a recognized endorsing religious organization's endorsement. The plaintiff priest had the approval of his specific Catholic church but not the approval of the Military Vicariate (now the Military Archdiocese). The court held "for the government to determine who is qualified for the various religious faiths to lead the flock of Catholicism would be for the government to impermissibly interfere or entangle itself and religion." *Id.* at 143. The same applies to all faith groups.

B. The Constitution Mandates the Military Honor and Respect its Chaplains' Religious Independence and Diversity Integrity

1. Exercise of religion is an individual right requiring accommodation of widely divergent beliefs

"The primary function of the military chaplain is to engage in activities designed to meet the religious needs of a pluralistic military community ...." *Id.* at 226. *Katcoff* illustrated that pluralism noting the great variety of denominations, *id.* at 225, and the Army's efforts to match *denominational* needs with chaplain assets, *id.* at 226 and note 1. The court matched the Army's means, chaplains, to the Army's compelling purpose, meeting individual free exercise needs. This examination further validated the Chaplain Corps' neutrality, denominational needs closely matched to the appropriate chaplain religious leaders prevents favoritism or disparagement of denominations.

2. The Free Speech Clause protects chaplains' speech and ministry

Chaplains have rank without command, 10 U.S.C. §§ 3581 and 8581, and are restricted from performing acts implicating the Sovereign's authority. The Free Speech and Establishment Clauses prevents chaplains from becoming "government religious officers." Every aspect of a

chaplain's duties involves speech: preaching, teaching, counseling and providing advice to commanders. The Free Speech Clause covers chaplains' expressive speech, performing rites, sacraments, or rituals. Chaplains can only provide religious speech as faith group representatives, because the government may not entangle itself impermissibly in a religious capacity.

Attempts by the military to restrict chaplains' religious speech would violate the Free Speech Clause as viewpoint or subject matter discrimination. When the government tells chaplain what to say in a manner that touches on religion, that becomes government religious speech under the Free Speech Clause entangling the government contrary to the Establishment Clause.

III. ELEVATING A COMMON LAW CRIME TO A CONSTITUTIONAL RIGHT CREATES A CONFLICT BETWEEN CHAPLAINS' FREE EXERCISE AND THE MILITARY'S GOOD ORDER AND DISCIPLINE REQUIREMENT

A. Recent Incidents Attacking Chaplains' Free Exercise and Free Speech Foreshadow the Establishment of a Government Religion Based on Same-sex Marriage and Homosexual Acts

Congress passed sections 533 and 532 of fiscal years 2013 and 2014 National Defense Authorization

Acts ("NDAA") respectively to provide specific protection for chaplains' speech and actions. Congress determined these protections were necessary after chaplains pointed out their rights were being infringed following repeal of Title 10's former statutory ban on homosexual behaviors and *Unites States v. Windsor,* 133 S.Ct. 2675 (2013), held the Defense of Marriage Act (DOMA) invaded an area traditionally reserved to the states and was unconstitutional.

35 Congressman signed the March 30, 2015, letter at Appendix A1-7 to the Secretary of Navy and the Navy Chief of Chaplains about an open and egregious violation of the NDAA protections.

> It is in the context of these protections and policies that we inquire about the specific case of Chaplain Wesley Modder. Our understanding is that Chaplain Modder's commanding officer has requested that Chaplain Modder be Detached for Cause after a Sailor at the Naval Nuclear Power Training Command complained about Chaplain Modder's views on pre-marital sex and homosexuality. Chaplain Modder is endorsed by the General Counsel of the Assemblies of God, an evangelical denomination that, like the Catholic Church and the Southern Baptist Convention, affirms the orthodox theological belief that sexual intimacy is designed for the context of marriage between one man and one woman.
>
> These beliefs on sexual intimacy do not constitute a legally viable reason to bring action

against Chaplain Modder or any member of the military. A3-4

Appendix A-8-13 is a Congressional letter (17 Representatives and 7 Senators) written on behalf of Army Chaplain (Major) Lawhorn who was disciplined as the result of some unknown complaint outside normal channels for providing his personal story in dealing with depression and relying on faith q– among other alternatives – during a suicide prevention class that chaplains must present. Like Modder's case, the Army superiors up the chain of command ignored the NDAA and the First Amendment protections.

These and other incidences reported to the House Armed Services committee during its November 2014 religious liberty hearings arise out of differing viewpoints on marriage and the very essence of man and woman. The common element in these incidents is the military's obvious failure to protect chaplains' First Amendment rights and enforce the NDAA's specific protections. This is by leaders whose very culture demands an obedience to orders, demonstrating there is an aggressive attack on historic Christian viewpoints because of its incompatibility with the religious principles underlying same-sex marriage.

The inevitable result of such a course of action which produces a chilling effect on all chaplains and orthodox Christian believers is the establishment of an official civic religion which disparages the Bible and suppresses historic orthodox Christian doctrine.

B. The Problem Facing Evangelical Chaplains Is Not Competing Theologies but Government Preference for Lawlessness

The retaliation against evangelical chaplains noted above illustrates the reality of two theologies diametrically opposed to each other. The historic orthodox Christian view of marriage is incompatible with same-sex marriage. Same-sex marriage's theology disregards the basic element of creation, that God made man in His image, and created them male and female. Amici's chaplains do not fear competition with other theologies, it's an everyday occurrence. The marketplace of ideas is the place where the competing theologies can be debated and evidence presented supporting each side.

The real problem illustrated above is the government has already taken sides and preferred one theology over another, abandoning the rule of law to establish by fiat what it cannot do through persuasion. The retaliation against evangelical chaplains for exercising their rights in accordance with their their Devine calling springs from a government preference for same-sex theology, *i.e.*,, over another, the classic orthodox Christian view of marriage. The law and is corresponding duty is clear: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another", *Larson v. Valente*, 456 U.S. 228, 244 (1982), yet the Military's preference against Chaplains Modder and Lawhorn is clear and unambiguous.

The direct relationship and linkage between the Military's preferential actions in retaliating and the alleged 14th Amendment issue before the Court is this, *disrespect for the rule of law*. The military knows what the NDAA says, it knows what the First Amendment and Uniform Code of Military Justice say, and yet its leadership chooses to disregard them.

If the Court were to rummage around in the Constitution and find a new right for same-sex marriage, it would embolden those who have already chose to disregard the clear commands of Title 10, its own regulations and the Constitution. In the current military leadership's eyes, such a new right will enable it to easily conclude these and Amici's chaplains preaching, teaching and counseling against and denigrating a "constitutional right", is clearly disruptive of good order and discipline and must be silenced.

The fact that the Court has elevated a common law crime to a constitutional right is on its face lawlessness, regardless of how cleaver and judicially crafted its magic words. The *Windsor* Court correctly and clearly stated that marriage is an area that has always been a state issue and no amount of judicial salesmanship will change the fact the recognition of same-sex marriage is altering the Constitution in an unconstitutional manner. Justice Brandeis's oft quoted dissent in *Olmstead v. United States*, 277 U.S. 438, 485 (U.S. 1928), accurately articulating the consequences of the government becoming a lawbreaker is no less true in constitutional adjudication.

> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the [constitutional] law the end justifies the means -- to declare that [new rights exist not embedded in the fabric of American liberty]-- would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

IV. THE MILITARY HAS A SPECIAL INTEREST IN KNOWING WHAT CONSTITUTION THEY ARE DEFENDING

These Amici not only represent their chaplains, but the military personnel who share their Christian faith and the churches who send them. Evangelical Christians have historically supported the military and sent their sons and daughters to defend the Constitution which supposedly guarantees them "the blessings of liberty" which the Constitution was written to protect and secure.

10 U.S. Code § 502(a) requires every military enlistee to take the following oath:

> "I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me ...."

Chaplains, like other military officers, take a similar but different oath which includes the same key words: "I will support and defend the Constitution of the United States against all enemies, foreign and domestic, that I will bear true faith and allegiance to the same ...."

The official religious prejudice against Chaplains Modder and Lawhorn and other similar incidents which have involved Amici's evangelical chaplains, and similar civilian incidents where religious beliefs were trampled in pursuit of political correctness, raise a legitimate question for all soldiers, sailors, airmen and marines: "Exactly what is this Constitution my oath requires I defend with my life?"

The Constitution did not exist when the Continental Army and Navy battled Great Britain, then the Superpower of the world, to create the United States. They fought for the rights England denied them, rights guaranteed by the Magna Carta,

the English Bill of Rights,[4] and England's unwritten constitution Sir William Blackstone defined in his Commentaries on the English Law. Those rights can be seen in the Declaration of Independence's list of grievances that correspond with Blackstone's list of all Englishmen's rights. The Declaration defined and summarized those rights in a unique American perspective based on a Christian view, "unalienable rights" endowed by their Creator, including "life, liberty and the pursuit of happiness" [5]

Inclusion of a Bill of Rights patterned after the English Bill of Rights was a condition for the ratification of the Constitution in 1789. America's military and citizenry understood the Constitution was a covenant between the States and the people establishing a Federal government of limited powers. The Bill of Rights clearly articulated non-negotiable rights which the government was to guarantee and not restrict except for the most compelling reasons.

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4. Act of Parliament, December 16, 1689, *see West's Encyclopedia of American Law, edition 2*. S.v. "English Bill of Rights." Retrieved at http://legal-dictionary.thefreedictionary.com/English+Bill+of+Rights

5. The Declarations' famous words, "That all men are created equal, that they are endowed by their Creator with certain unalienable rights" rests on Genesis 1:26-27 account of creation: "and then God said, "Let us make man in our image....So God created man in his own image, in the image of God he created him; male and female he created them." Because God did not distinguish among men in his creation, he made them equal; our unalienable rights attach because they come from the Creator who made us in His image and man cannot take them.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

The Ninth and Tenth Amendments specifically reserved to the States and the people the powers not specifically delegated to the Federal government. Those delegated powers in 1789 did not include the power to regulate or define marriage, a power this Court recognized was reserved to the states in *Baker v. Nelson*, 409 U.S. 810, 810, (1972) (same-sex couple's constitutional challenge did not raise "a substantial federal question") and *Windsor*, 133 S. Ct. at 2691-92 ("Defense of Marriage Act's unprecedented intrusion into the States' authority over domestic relations), 2692 ("DOMA ... departs from this history and tradition of reliance on state law to define marriage"), 2692-93 (Congress powerless to interfere "with the States' long-held authority to define marriage") (2013).

Petitioners ask this Court to make law by declaring a former common law crime, forbidden from the founding of this nation until recently, a

constitutional right. Same-sex marriage was forbidden by the common law when the Constitution was ratified in 1789. English common law made the practice of homosexuality a crime, "buggery", which colonial and State laws adopted before and after American independence.

The Fourteenth Amendment, ratified in 1868 to address the denial of the newly freed slaves equality before the law, did not delegate to the federal government the power to regulate or define marriage. Same-sex marriage at that time was not possible for any race because homosexuality was still a crime under State laws. There can be no historic liberty interest in a crime. To declare this common law crime, which remained a crime in most states until recently, a constitutional right means this Court will have either made national law, usurping Congress's Article I power that *Windsor* denied, or engaged in amending the Constitution, a power Article V specifically reserves to Congress, the States and ultimately the people.

Petitioners argue that the 14th Amendment means something those who passed it and ratified it never envisioned or contemplated, an invitation to travel back in time and rearrange history. Had that meaning been specifically addressed in the legislative history and debates leading up to that Amendment's passage, its ratification would have been doomed.

Petitioners offer no evidence the States ceded to the Federal Judiciary the right to (1) usurp fundamental reserved powers specifically not

delegated to the Federal government when the Constitution was discussed, passed, and ratified; or (2) "tune up" the Constitution to what a majority of justices agree comports with their current view of appropriate morality. Absent appropriate judicial restraint, nothing prevents polygamy, bestiality, or any other practice or crime which many people currently would call a perversion, from becoming a constitutional right merely because it provides some disaffected group meaning, an alleged dignity, and personal fulfillment. A Florida man's claim for a constitutional right to have sex with a donkey based on *Lawrence v. Texas*, 539 U.S. 558 (2003), proves the point. *See* Vishal Persaud, Lawyers for donkey-sex suspect challenge law's constitutionality, Ocala StarBanner, Dec. 11, 2012, http://www.ocala.com/article/20121211/ARTICLES/121219937?p=1&tc=pg).
What are the Court's limits, if any, on establishing former criminal acts as new rights under the Fourteenth Amendment? How is that not amending the Constitution?

If the Court grants Petitioners' request, what then is the Constitution? It no longer represents a government of the people, by the people or for the people, but whatever nine unelected justices agree it is. This is not a value worthy of one's life, given our past cost defending against arbitrary tyranny, whether it be king, prince or tyrant.

LCDR Modder's situation demonstrates the objective of those pushing same- sex marriage is not equality, but destruction of competing theologies and ideologies. Contrary to well established precedent,

the First Amendment appears to be a casualty in the military in the pursuit of forced acceptance of historically criminal pagan practices. This should raise concerns.

> Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

Barnett, 319 U.S. at 641.

Amici's experience as evidenced by the incidents thus far is recognizing a former common law crime as a constitutional right will "amend" the First Amendment out of the Constitution. What then is the Constitution military personnel are asked to defend with their lives? Will parents recommend their children undertake the nation's defense on so slim a reed?

CONCLUSION

The Court's decision in this case has implications and applications far beyond the facts and situations presented in the competing briefs. Elevating a common law crime to a constitutional right guarantees conflicts, continued division, the further erosion of other well-established constitutional rights that are already restricted due to the unique nature of military service. This will result in a climate that will penalize and repel those with traditional, conservative Christian beliefs and be an interpreted by the military as the Court's invitation to the military to become instruments of tyranny, replacing the rule of law.

To this, these Amici object and express their concern. They urge the Court to affirm the Sixth Circuit's constitutionally based decision that regulation and definition of marriage was and remains a power retained by the States over which federal courts have no jurisdiction.

Respectfully submitted,

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Nos. 14-556, 14-562, 14-571, 14-574

In The Supreme Court of the United States

JAMES OBERGEFELL, ET AL.,
Petitioners,

V.

RICHARD HODGES,
Respondent.

BRITTANI HENRY, ET AL.,
Petitioners,

V.

RICHARD HODGES,
Respondent.

Additional Case Captions Listed on Inside Front Cover

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

APPENDIX A

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APRIL DEBOER, ET AL.,

Petitioners,

v.

RICHARD SNYDER, ET AL.,

Respondents.

VALERIA TANCO, ET AL.,

Petitioners,

v.

WILLIAM EDWARD "BILL" HASLAM, ET AL.,

Respondents.

TIMOTHY LOVE, ET AL. AND GREGORY BOURKE, ET AL.,

Petitioners,

v.

STEVE BESHEAR,

Respondents.

Congress of the United States
Washington, D.C. 20515

March 30, 2015

The Honorable Ray Mabus Secretary of the Navy
1000 Navy Pentagon, Room 4E686 Washington, DC
20350-1000

Rear Admiral Margaret Kibben Chief of Chaplains,
United States Navy 2000 Navy Pentagon, Room
5E270 Washington, DC 20350-2000

Dear Secretary Mabus and Rear Admiral Kibben:

As Members of Congress, we are deeply invested in protecting the vital role of chaplains in the United States military. Military chaplains fill a crucial religious need that exists uniquely in the realm of military service—a need that is imperative to the well-being and operational readiness of the troops. Their religious guidance and selfless service are crucial pillars to the health and success of our service members. For two hundred and forty years, Navy Chaplains have been the unsung heroes of the American warrior.

A chaplain serves a dual duty that is summed up in the Chaplain Corps motto, Pro Deo Et Patria, "For God and Country." In carrying out this dual duty, chaplains are answerable both to the military and to their endorsing denomination. Under Department of Defense policy, a chaplain is answerable to his or her

endorsing denomination—not the military—for evaluation of theological positions and fitness to serve as a representative of the endorsing denomination. If a chaplain's ecclesiastical endorsement is withdrawn, the chaplain must either find another endorsement or be processed for separation. It is imperative that chaplains remain free to carry out all aspects of their ministry in a manner consistent with the tenets of their faith.

Congress passed conscience protections for servicemembers and chaplains in the National Defense Authorization Act in order to provide concrete protections for the free exercise of religion and the physical manifestations of beliefs. As you know, these conscience protections have been implemented by the Department of Defense through two Instructions: DoDI 1300.17, "Accommodation of Religious Practices Within the Military Services," and DoDI 1304.28, "Guidance for the Appointment of Chaplains for the Military Departments." These instructions make clear that expressions of belief are protected within the bounds of good order and discipline and that a chaplain may not be required to perform any rite, ritual, or ceremony that is contrary to his or her conscience, moral principles, or religious beliefs. Under these instructions, no servicemember may discriminate or take adverse personnel action on the basis of these actions by a chaplain.

Additionally, Navy policy and training documents make clear that a chaplain's role is to provide religious ministry. Chaplains "have the freedom to practice their religion according to the tenets of their faith. If,

in chaplains' discharge of their broader duties within the unit, they are faced with an issue contrary to their individual faith, they may refer Sailors to other appropriate counsel." In other words, if a chaplain is unable to perform in the way a Sailor requests, the chaplain's job is to provide for that need by connecting the Sailor with someone who can.

Navy policy also protects a chaplain's ability to preach and teach consistent with the tenets of his or her endorsing denomination, even when Sailors may disagree with the chaplain's remarks: "Chaplains have the right to express their religious beliefs during their conduct of a service of worship or religious study. Unless a chaplain's speech is otherwise prohibited, such as publically maligning senior leaders, their sermons and/or teachings cannot be restricted, even with regard to socially controversial topics."

It is in the context of these protections and policies that we inquire about the specific case of Chaplain Wesley Modder. Our understanding is that Chaplain Modder's commanding officer has requested that Chaplain Modder be Detached for Cause after a Sailor at the Naval Nuclear Power Training Command complained about Chaplain Modder's views on pre-marital sex and homosexuality. Chaplain Modder is endorsed by the General Counsel of the Assemblies of God, an evangelical denomination that, like the Catholic Church and the Southern Baptist Convention, affirms the orthodox theological belief that sexual intimacy is designed for the context of marriage

between one man and one woman.

These beliefs on sexual intimacy do not constitute a legally viable reason to bring action against Chaplain Modder or any member of the military. If the request that Chaplain Modder be Detached for Cause is based on Chaplain Modder's belief that where his faith conflicts with Navy policy, he must follow his faith and contact the necessary commanding officer, then the request is untenable and must be denied. Likewise, if it is based on Chaplain Modder's religious belief that sexual intimacy was designed for the context of natural marriage—an orthodox religious belief that is held by the majority of chaplains in the Chaplain Corps as well as by Chaplain Modder's endorsing denomination—it must be denied. It is dangerous to fall prey to the -ffindamentally false proposition that individuals who support natural marriage can only be motivated by animus for others.

We request that you provide information on the nature of the accusations and investigations and ask that all investigations be conducted in accordance with laws protecting a chaplain's right to express and conduct himself according to his religious beliefs. We further request an outline of the process and timeline for review of the investigation and possible resulting actions.

Finally, as a reassurance to chaplains, sailors, and the public, we would like confirmation as to what steps the Navy is taking to reinforce the policies and protections in place for servicemembers

and chaplains to freely exercise their religiously-informed beliefs, including the freedom of chaplains to adhere to the tenets of their faith as they perform and provide in all aspects of their ministry, including in counseling sessions. We also request information as to how the Navy has been implementing the conscience protections passed by Congress and what training has been provided to chaplains, JAG officers, Equal Opportunity officers, and commanding officers.

Thank you for your service and your commitment to our nation's Sailors. Your leadership in our military is vital, Thai* you for your prompt attention to this matter.

Sincerely,

J. Randy Forbes
Member of Congress

Vicky Hartzler
Member of Congress

Doug Lamborn
Member of Congress

John Fleming
Member of Congress

Doug Collins
Member of Congress

Tim Huelskamp
Member of Congress

Walter B. Jones
Member of Congress

Joseph R. Pitts
Member of Congress

Randy Neubauer
Member of Congress

Richard Hudson
Member of Congress

Bob Goodlatte
Member of Congress

Jeff Miller
Member of Congress

K. Michael Conaway
Member of Congress

Robert R. Aderholt
Member of Congress

Randy K. Weber
Member of Congress

David Rouzer
Member of Congress

Steven Palazzo
Member of Congress

Tim Walberg
Member of Congress

Mike Kelly
Member of Congress

Diane Black
Member of Congress

Steve Russell
Member of Congress

Rob Wittman
Member of Congress

Robert Latta
Member of Congress

Austin Scott
Member of Congress

French Hill
Member of Congress

Robert Pittenger
Member of Congress

Keith Rothfus
Member of Congress

Trent Franks
Member of Congress

John Kline
Member of Congress

Matt Salmon
Member of Congress

Gregg Harper
Member of Congress

Phil Roe
Member of Congress

Brian Babin
Member of Congress

Bill Posey
Member of Congress

Mike Pompeo
Member of Congress

Congress of the United States
Washington, D.C. 20515

February 5, 2015

The Honorable John McHugh Secretary of the Army
101 Army Pentagon Washington, DC 20310-0101

Dear Secretary McHugh:

We are very concerned to learn about the recent disciplinary action taken against Chaplain (Captain) Joseph "Joe" Lawhorn while he was stationed at Fort Benning.

On November 20, 2014 Chaplain Lawhorn conducted a mandatory suicide awareness and prevention briefing for the 5th Ranger Training Battalion. It is our understanding that during this briefing Chaplain Lawhorn presented both spiritual and secular behavioral health resources available to soldiers for managing depression on a double-sided handout, making clear that the spiritual options were just some of many available resources. Subsequently, Colonel David Fivecoat issued Chaplain Lawhorn a Letter of Concern stating "this made it impossible for those in attendance to receive the mandatory resource information without also receiving the biblical information." The Letter of Concern was filed despite the absence of a formal Equal Opportunity complaint within the chain of command and although Chaplain Lawhorn had not violated any

Army regulations.

We believe this administrative action sets a dangerous precedent for Army suicide prevention initiatives, the role of Army chaplains, and most importantly, the ability for service members to exercise ami express religious beliefs, as protected under the First Amendment and reinforced by current law and DoD regulations.

Army health experts, in conjunction with the American Association of Suicidology, have correctly acknowledged that spiritual health is an integral component for developing a soldier's resiliency when combating depression. Suicide Prevention, a United States Army Center for Health Promotion and Preventive Medicine resource manual, clearly encourages not only chaplains, but also secular behavioral health providers to at least reference, if not stress, the importance of spirituality and religion during suicide prevention training. In short, Colonel Fivecoat's disciplinary action is not only unwarranted given current Army guidance, but the resulting implication that spirituality is incompatible with this training also undermines the recommendations made by Army health professionals.

Furthermore, Chaplain Lawhorn's Letter of Concern erodes the pivotal role of chaplains within Army units. Army Pamphlet 600-24 clearly states that chaplains are to be integrated as a member of a unit's Suicide Prevention Task Force, with duties including, among others, advising commanders on

moral, ethical and other stress factors that increase risk, acting as a first responder in crisis situations, and developing policies and procedures for monitoring high risk soldiers. Chaplains have historically taught mandatory suicide awareness and prevention courses, serving the Army in a vital capacity to protect soldiers from suicide.

Established by George Washington in 1775, the chaplaincy fills many vital roles in the military that could not be accomplished by any other means, including offering a unique and inherently religious perspective on life and death issues. During consideration of the Fiscal Year 2015 National Defense Authorization Act (NDAA), Congress affirmed the spiritual leadership chaplains provide to service members and military commanders alike as well as the role of chaplains in facilitating the free exercise of religion. The Army's administrative action sends the wrong message not only to chaplains of all faith traditions throughout the Army, but also to soldiers as well, that spirituality and religion are not welcome in the Army as viable methods for coping with suicidal thoughts or other personal issues more broadly.

Finally, we are concerned that this disciplinary action violates First Amendment free speech protections that are undergirded by statute reflected in the FY2013 and FY2014 NDAAs, along with the accompanying DoD regulations. In fulfilling his duties as a chaplain, Captain Lawhorn shared both his personal struggle with depression as well as biblical references and materials in accordance with

the views of his endorsing agency and complementary to personal convictions. It is our understanding that Chaplain Lawhorn's actions were in line with the NDAA protections, DoD regulations, as well as Army policy and guidance.

To date, we have yet to receive any indication from the Army that these religious freedom protections were considered before issuing the Letter of Concern. We request that you provide the Army's review of this incident as it relates to federal law, DoD regulations and Army policy.

Additionally, we request that you provide an explanation of a chaplain's role in conducting Army training.

We appreciate your previous engagement on matters related to religious freedom within the context of Army training. We fully expect Army to take the steps necessary in protecting the religious freedom of all soldiers while affirming the vital role of chaplains in ensuring the well being of our soldiers.
Thank you for your prompt attention to this matter and we look forward to your response.

Sincerely,

John Fleeming, M.D.
United States Representative

James M. Inhofe
United States Senator

Michael S. Lee
United States Senator

Tom Cotton
United States Senator

Ted Cruz
United States Senator

David Vitter
United States Senator

Roy Blunt
United States Senator

James Lankford
United States Senator

Walter B. Jones
United States Representative

J. Randy Forbes
United States Representative

Jeff Miller
United States Representative

John Kline
United States Representative

Trent Franks
United States Representative

Doug Lamborn
United States Representative

Vicky Hartzler
United States Representative

Austin Scott
United States Representative

Steven Palazzo
United States Representative

Jim Bridenstine
United States Representative

Jackie Walorski
United States Representative

Bradley Byrne
United States Represenetative

Ryan Zinke
United States Representative

Tim Huelskamp
United States Representative

Doug Collins
United States Representative

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